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No. 86-1493

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE BANK OF INDIA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

LOCAL 6, INTERNATIONAL FEDERATION
OF HEALTH PROFESSIONALS, AFL-CIO
Intervening Party Respondent.

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings within the meaning of Supreme Court Rule 17 so as to call for this Court's granting a Writ of Certiorari.

2. Whether the Court of Appeals' decision that the State Bank of India is an employer within the meaning of the National Labor Relations Act is erroneous as a matter of law.

3. Whether the Court of Appeals' decision that the State Bank of India was not entitled to an evidentiary hearing on its objections to the representation election violated State Bank of India's rights to due process.

LIST OF PARTIES

All parties to the proceeding in the Court whose judgment is sought to be reviewed are:

STATE BANK OF INDIA
Petitioner-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Petitioner.

LOCAL 6, INTERNATIONAL FEDERATION OF HEALTH PROFESSIONALS, AFL-CIO,
Intervening Party Respondent.

LISTING PURSUANT TO RULE 28.1

Reserve Bank of India is the parent company of the State Bank of India.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 808 F.2d 526 (7th Cir. 1986). The National Labor Relations Board's two decisions and orders are reported at 273 NLRB 264 (1984) and 273 NLRB 267 (1984). The opinions of the Court of

Appeals and of the Board are set out in the Appendix attached to the Petition for a Writ of Certiorari at A-1, A-33 and A-40, respectively.[1]

STATEMENT OF JURSIDICTION

The judgment of the Court of Appeals in this case was entered on December 11, 1986. The Petitioner, State Bank of India, filed its Petition for a Writ of Certiorari in this Court on March 11, 1987.

This Court has juridiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 2(2) of the National Labor Relations Act, 29 U.S.C. §152(2), provides as follows:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to Railway Labor Act as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

STATEMENT OF THE CASE

The State Bank of India ("Bank") was nationalized and incorporated in India by the State Bank of India Act of 1955. The Bank maintains branch offices in New York and Chicago and an agency in Los Angeles. The branch offices offer general banking services to the public, including checking and savings accounts, commercial

1. "A- " refers to pages in the Appendix attached to and immediately following the Petition for a Writ of Certiorari.

loans, letters of credit, and foreign currency exchange. The Bank's deposits in the United States are insured by the Federal Deposit Insurance Corporation ("FDIC"). The Bank's foreign employees who are employed in the United States are subject to United States immigration laws. The Bank's United States operations are also subject to Federal and State banking regulations and taxes.

In each branch, the local branch managers are responsible for day to day operations of the Bank and for local personnel decisions, including the hiring and firing of employees. Except for upper level management in each United States branch office, e.g., manager, assistant manager, and accountant, the State Bank of India hires all United States branch employees locally, including those who are represented by Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO, ("Local 6" or "Union").

The State Bank of India acts as an agent for the Reserve Bank of India in locations where the Reserve Bank is not established. The Reserve Bank of India is a wholly owned and controlled agency of the Indian Government and owns more than ninety-two (92) percent of the stock in the State Bank of India. The Court of Appeals found that the relationship between the State Bank of India and the Reserve Bank of India is an agency relationship nearly identical to that which exists between United States banks and the American Federal Reserve Bank. (A-8). The branch offices of the Bank peform the same services as those that are provided by most American banks.

On July 14, 1982, the Union petitioned the National Labor Relations Board ("NLRB" or "Board") for a representation election at the Banks New York branch. The Union sought to represent all full-time and regular part-time tellers, clerks, clerk-typists, messengers, bookkeepers, receptionist, secretaries, and machine operators.

Pursuant to a stipulation for certification, the NLRB conducted an election on September 2, 1982. The vote was 43 to 34 in favor of Union representation.

The Bank filed timely objections to the election, arguing that "the laboratory conditions necessary for a free and fair election" had been destroyed. The Bank alleged, *inter alia,* that the Union had attempted to inject "racism" into the pre-election compaign.

The Regional Director for the Second Region of the National Labor Relations Board recommended that the Bank's objections be overruled. The Region accordingly issued a certification of representation to the Union. The Regional Director also determined that no hearing on the Bank's objections was warranted because the objections were meritless as a matter of law. The Bank thereupon filed exceptions to the Regional Director's recommendations, objecting to his findings of fact and requesting that a hearing be held on the Bank's objections. On February 23, 1983 however, the Board adopted the Regional Director's recommendations and certified the Union as the exclusive bargaining representative for the Bank's clerical employees.

The Bank subsequently refused to bargain with the Union. By letter dated March 17, 1983, counsel for the Bank notified the Union that the Bank considered the Board's certification of the Union to be erroneous and that it would therefore decline to bargain with the Union. The Bank has admitted in its Petition for a Writ of Certiorari that it deliberately refused to bargain with the Union in an attempt to obtain judicial review of the Board's decision to certify the Union. (*See* Petition at 6). In addition, the Bank granted a unilateral wage increase to its employees despite its obligation under Section 8(a)(5) of the Act, 29 U.S.C. §158(a)(5), to bargain on this issue with the Union. The Bank granted the wage increases on April 28, 1983, retroactive to April 1, 1983, to all employees in the bargaining unit described above without notice to or consultation with the Union.

The Union filed charges of unfair labor practices against the Bank with the NLRB. After investigating these charges, the General Counsel for the Board issued two complaints, alleging that the Bank had further violated the Act by refusing to bargain with the Union and that the Bank had violated the Act by unilaterally granting a wage increase to its employees. The Bank admitted in an answer that it had refused to bargain with the Union, but submitted as a defense that the Board's certification of the Union was erroneous. General Counsel for the NLRB subsequently moved for summary judgment. After the Bank submitted reply briefs in both cases, the Board ruled that the Bank had violated the National Labor Relations Act and directed the Bank to begin to bargain with the Union. *State Bank of India and Local 6, IFHP*, 273 NLRB 264 (1984); *State Bank of India and Local 6, IFHP*, 273 NLRB 267 (1984).

The Bank filed timely petitions with the United States Court of Appeals for the Seventh Circuit for a review of the Board's orders. In response, the Board filed cross petitions for enforcement of its orders. On December 11, 1986, the Court of Appeals entered an order enforcing the Board's petitions for enforcement. *State Bank of India v. National Labor Relations Board*, 808 F.2d 526 (7th Cir. 1986).

ARGUMENT

A. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS NOT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WITHIN THE MEANING OF SUPREME COURT RULE 17 SO AS TO JUSTIFY THIS COURT'S GRANTING OF THE WRIT OF CERTIORARI.

The United States Court of Appeals for the Seventh Circuit enforced the Board's orders in their entirety. Specifically, the Court held that: 1) the State Bank of India

is an employer within the meaning of the National Labor Relations Act, and 2) the National Labor Relations Board did not abuse its discretion in exercising jurisdiction over the State Bank of India. In *State Bank of India*, 229 NLRB 838 (1977), the Board asserted jurisdiction over the State Bank of India for the first time. The Board held at that time that there was no valid justification for declining to assert jurisdiction over an alleged instrumentality of a foreign state when that employer engages in commercial activity in the United States which meets the Board's jurisdictional standards.

The Board has continued since 1977 to assert jurisdiction over the State Bank of India and over other foreign instrumentalities similarly situated. This determination by the Board is consistent with the decision of this Court in *International Longshoremen's Local 1416, AFL-CIO v. Ariadne Shipping Co.*, 397 U.S. 195 (1970).

Because the Board's decision in this case is consistent with its own case law since 1977 and is consistent with the law of this Court, there are no "special and important reasons" within the meaning of Supreme Court Rule 17 for this Court to grant the Petitioner's request for a Writ of Certiorari.

B. THE DECISION OF THE COURT OF APPEALS THAT THE NATIONAL LABOR RELATIONS BOARD MAY ASSERT JURISDICTION OVER THE STATE BANK OF INDIA IS CONSISTENT WITH THE PRINCIPLES OF THE CASE LAW OF THIS COURT.

This Court has long recognized that in passing the National Labor Relations Act, Congress vested in the National Labor Relations Board the fullest jurisdiction breath that was constitutionally permissible under the commerce clause. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). The language of Section 2(2) of the National Labor Relations Act grants the Board jurisdiction over "any" employer doing business in the United

States, with the exception of certain specified exclusions. 29 U.S.C. §152(2). Thus, with the exception of these specified exclusions, Congress has granted to the National Labor Relations Board plenary jurisdiction.

This Court held in *International Longshoremen's Local 1416, AFL-CIO v. Ariadne Shipping Co.*, 397 U.S. 195 (1970) that United States residents who were employed by a foreign ship to do longshoremen's work in the United States were covered by the National Labor Relations Act. The Court specifically noted that the employees involved were American residents, hired to work exclusively on American docks, and that they did not work as seamen on the foreign employer's vessels. *Local 1416*, 397 U.S. at 200. Similarly, the dispute in the instant case revolves around wages to be paid to American residents, "who do non-managerial work for a foreign concern engaged in a commercial enterprise in this country." *State Bank of India v. NLRB*, 808 F.2d at 534.

There is therefore no objective or policy rationale to support the Bank's argument that the NLRB should withhold the exercise of its jurisdiction over the Bank's operations in this county. As the Court of Appeals noted, there is no evidence in the record (and indeed no argument is made in the Petition) that allowing the employees of its American operations to seek representation by a labor union in the United States for the purposes of collective bargaining over terms and conditions of employment in the United States will interfere with the Bank's obligations to the Reserve Bank of India in India or in any way disrupt the monetary policy of the Indian government. *State Bank of India v. NLRB*, 808 F.2d at 534. With the exception of the managerial employees noted above, all of the Bank's employees at its United States offices are American residents. Some of them are American citizens, while others are American residents awaiting naturalization. As American residents, these employees are entitled to the protections of American

law. Thus, there is no question that the employer is engaged in commerce within the meaning of the National Labor Relations Act.

If the Bank's arguments were to be accepted, then in essence an anomalous situation would be created whereby the Bank acceded to all Federal and State regulations with regard to banking practices, thereby guaranteeing, to the fullest extent possible, security for its American depositors. Nonetheless, its own employees, working in the United States would not be subjected to the full panoply of protections available under the various Federal and State statutes designed to protect employees. It is hard to believe that Congress ever intended that an enterprise connected to a foreign government which engages in substantial commercial functions in the United States is somehow exempt from statutes such as the National Labor Relations Act. It is even more difficult to accept as logical that the Bank can somehow pick and choose among the various regulatory schemes to decide to which it will be subject.

In summary, it is clear that the State Bank of India is an employer within the meaning of Section 2(2) of the Act.

C. IT WAS NOT ERROR FOR THE COURT OF APPEALS TO AFFIRM THE NLRB'S RULING THAT THE STATE BANK OF INDIA WAS NOT ENTITLED TO AN EVIDENTIARY HEARING ON ITS OBJECTIONS TO THE REPRESENTATION ELECTION.

The Bank has sought review of the decision by the Court of Appeals that the Bank was not entitled to an evidentiary hearing on its objections to the representation action. (Petition pp. 13-16). The Bank's argument in this respect must be considered against the background of this Court's decision in *NLRB v. A.J. Tower, Co.*, 329 U.S. 324, 330 in which this Court held:

> Congress has entrusted the Board with a wide degree of discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.

The Bank has predicated its attack on three separate claims: (1) that Local 6 supporters distributed an altered memorandum signed by the president of the Bank that supposedly mislead Bank employees into believing that the Bank favored Local 6; (2) that Union supporters defaced the NLRB official notice of election; and (3) that a letter distributed by Local 6 alleging discrimination on the basis of race constituted an appeal to racial prejudice.

1. Altered Bank Memorandum.

The Regional Director refused to order a hearing with regard to the Bank Memorandum since, as the Court of Appeals observed, the memo was one of more than ten (10) memoranda distributed by the Bank and, all of which other than the allegedly altered memo, made clear that the Bank opposed Local 6's attempt to become certified as the bargaining representative for employees. 808 F.2nd at 538.

The Bank failed to present any evidence that the Union itself was responsible for the forgery. Under such circumstances, the Board has long held that absent some proof that the principal parties themselves are involved, the improper acts of some third party are less damaging to the validity of an election. *NLRB v. ARA Services, Inc.*, 717 F.2d 57, 66 (3rd Cir. 1973); *Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir.). The Bank's failure to proffer present evidence concerning the Union's responsibility for the forged letter indicated that the Bank's desire for a hearing was based on the hope that someone might testify at such a hearing in a manner that would link the Union to the altered memorandum. The Bank then was relying merely on allegations and obviously lacked sufficient evidence with regard to this point.

In addition, both the Board and the Court of Appeals concluded that the assertion of the forged letter interfered with employee free choice was simply not credible. The only evidence presented to the Board indicated that once an employee saw the forged letter, that employee checked with a representative of the Bank. Under such circumstances, clearly no hearing was warranted with regard to this memorandum.

2. The Defaced Notice of Election.

The Bank has alleged that an unidentified person defaced the sample National Labor Relations Board ballot. The Bank, however, has failed to produce any evidence whatsoever linking the Union to this action. Moreover, the ballot was quickly replaced by unaltered ballots. No evidence was presented by the Bank to challenge the decision by the Board that employees were unlikely to be misled. The Board's conclusion that the Bank failed to make a *prima facie* case requiring a hearing with regard to the defacing of the ballots is thus equally meritorious.

3. Alleged Appeal to Racial Prejudice.

One Union campaign letter alleged that the Bank was maintaining oppressive conditions and low wages because of the nationality and racial status of the employees. The Bank has alleged that this letter tainted the election atmosphere by constituting an appeal to racial prejudice.

The Board was correct in rejecting that Bank's challenges without a hearing here simply because the statement challenged was hardly racially inflamatory. Rather, the disputed statement — "the State Bank of India is trying to keep the press conditions and low wages for its employees because of most of you are of Indian nationality and other minority groups" (A-29) — in essence

contends that in order to *avoid* the racial discrimination, employees should vote for Local 6.

The Board has long held that reliance upon racial prejudice is a basis for overturning an election. *Sewell Manufacturing Co.*, 138 NLRB 66, 72 (1962). Here the Union was hardly urging people to vote in favor of Local 6 in order to further racial prejudice but rather was seeking to obtain support on the grounds that the Union would prevent discrimination.

Thus, the Board was correct in dismissing the Bank's objections with regard to the alleged appeal or racial prejudice without a hearing. The NLRB was perfectly capable of analyzing this statement without a hearing and its refusal to conduct such a hearing can hardly be deemed improper, particularly in light of the Board's expertise. *Cf. Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully Submitted

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